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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

[Protest Alleging Mistake in Bid]

FILE: B-197437

DATE: February 18, 1981

MATTER OF: B&A Electric Co.

DIGEST:

1. Agency's authority under Federal Procurement Regulations (FPR) to determine whether mistake in bid is doubtful and therefore should be referred to GAO does not prevent GAO from reviewing that determination. Subsequently, when GAO decides whether withdrawal of bid should be permitted, GAO will make independent determination and allow withdrawal if it reasonably appears error was made.
2. Bidder who is awarded contract by agency despite claim of error is entitled to relief where evidence shows that supplier's original quote omitted some items although amount of intended bid is not shown. Withdrawal will be permitted whenever it appears an error has been made, as acceptance of bid with knowledge of error does not constitute valid and binding contract.

B&A Electric Co. (B&A) claims a mistake in its bid which resulted in the award of a contract by the Bureau of Reclamation, United States Department of Interior (Bureau) for the installation of main bus sectionalizing equipment at Tracy Switchyard, Central Valley Project, California.

On the August 30, 1979 bid opening date the following five bids were received:

| | |
|---------------------------|-----------|
| B&A Electric Co., Inc. | \$194,570 |
| Acme Electric, Inc. | \$250,465 |
| Kingson Contracting | \$252,500 |
| Slaten Electric Co., Inc. | \$277,775 |
| Crater Line Construction | \$312,848 |

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After bid opening on September 4, B&A called the Bureau and indicated that its supplier--Sierra Switchboard Company (Sierra)-- for the most significant single item making up the bid--the 230 KV power circuit breaker--made a mistake in its price quoted to B&A. B&A then submitted a letter dated September 17 which stated that B&A's bid of \$194,570 was based on an oral quote from Sierra of \$97,500 for the circuit breaker. B&A further explained that Sierra detected an error in its quote and requested that its bid be corrected to \$232,803 to reflect Sierra's corrected quote of \$128,350. B&A's letter included that firm's worksheets which indicated that Sierra was to supply the circuit breaker, stud connectors, engineering and spare parts. B&A contended that Sierra's original quote of \$97,500 failed to include these necessary items. The contracting officer considered B&A's submission to be incomplete as it did not contain evidence from Sierra and requested additional information from B&A. Additional information was provided including a sworn statement from Sierra's Secretary which indicated that Sierra's original price, which was quoted before Sierra had reviewed the specifications, was based on the assumption that the stud connectors, engineering and spare parts were separate items. Sierra's Secretary also stated that once it found that the single item included all those elements, it revised its quote to \$128,350. Included with this letter were an undated Sierra estimate sheet indicating the breakdown of the \$128,350 quotation, a copy of an order for a motor operated switch at \$11,875 which also carried the notation "\$97,500"--a motor operated switch is a part of the overall project--and a worksheet with unidentified numbers including \$97,500 and \$98,451.

Since the contracting officer was unconvinced by this evidence, he informed B&A by letter of September 28 that B&A was to be awarded the contract. B&A objected to the award, returned the contract documents unsigned and indicated it would take the award at its corrected price. The contracting officer then reconsidered all the evidence and on October 18 sent a determination to the Office of the Secretary of the Interior which concluded:

"It appears that B&A Electric Co., Inc. may have been negligent in supplying incomplete bidding information to their supplier but the supplier did not make a mistake. The supplier [Sierra] quoted a price to B&A based on the information furnished to him by B&A. Therefore B&A's bid is not in error and they should not be allowed to adjust their bid price."

However, because the bid prices of the second and third bidders were 28.7 and 29.7 percent higher than B&A's bid and 26 and 27 percent higher than the revised Government estimate, the contracting officer recommended that B&A be allowed to withdraw its bid, the solicitation be canceled because the remaining bid prices were unreasonable and the requirement readvertised.

The Secretary's Office disagreed with the contracting officer's determination and concluded that B&A not be allowed to either withdraw or correct its bid. That Office found that the evidence submitted by B&A and Sierra contained no data showing how either the original or revised circuit breaker quotes were derived and concluded that this lack of clear and convincing evidence of error and the fact that B&A's original bid was not out of line with the revised Government estimate prevented the agency from permitting B&A to withdraw its bid. Consequently on January 9, 1980, B&A was notified that it would not be allowed to withdraw and B&A executed the contract under protest.

B&A contends that it submitted sufficient evidence to prove both that a mistake was made and the amount of its intended bid. The protester argues that the Bureau refused to let it withdraw because it construed the clear and convincing evidence standard too strictly and improperly failed to submit the matter to our Office. Thus, B&A maintains it is entitled either to an adjustment in its contract price from its erroneous price of \$194,570 to the corrected price of \$225,675¹ or to have the contract terminated for convenience.

¹Originally B&A requested an adjustment to \$232,803, but subsequently Sierra agreed with B&A to reduce its price.

The Bureau contends that it did not find that clear and convincing evidence of a mistake existed and therefore it properly refused to permit B&A to withdraw its bid. It also argues that as it determined that the case was not doubtful it was not obligated under Federal Procurement Regulations (FPR) § 1-2.406-3(e) (1964 ed., amend. 204) to refer the matter to our Office and maintains that our scope of review in these matters is limited to considering whether the Bureau's determination not to permit withdrawal was reasonable.

The regulations provide that agencies may permit a bidder to correct its bid where the agency determines that clear and convincing evidence exists both as to the existence of a mistake and the bid actually intended, and that if the agency determines that clear and convincing evidence only exists as to the mistake, the bidder may be permitted to withdraw its bid. FPR § 1-2.406-3. The regulations also provide that no bidder may be deprived of its right to have the matter reviewed by our Office and doubtful cases should be submitted to us for an advance decision. FPR § 1-2.406-3(e). Thus, where there is clear and convincing evidence of a mistake, for example, an agency may act accordingly and permit withdrawal. Similarly, where there is clearly no evidence at all to support an allegation that a mistake has been made, the agency may not permit such relief. However, where the bidder submits some evidence to the agency which reasonably supports the allegation of error but the evidence is not clear and convincing the matter is to be submitted to this Office for determination. Murphy Brothers, Inc.--Reconsideration, 58 Comp. Gen. 185 (1978), 78-2 CPD 440.

It is also clear that the FPR standard of clear and convincing evidence applies only to administrative determinations by executive agencies. In reviewing mistake in bid claims, we have long recognized that the degree of proof required to justify withdrawal of a bid before award is in no way comparable to that necessary to allow correction of an erroneous bid. 36 Comp. Gen. 441; 52 id. 258 (1972).

Thus, when a bidder requests that it be allowed to correct its bid because of mistake, this Office does require the bidder to show, by clear and convincing evidence, the mistake and the intended bid, and when we review an agency determination in this particular area, we sustain the administrative decision unless we find that decision unreasonable. Murphy Brothers, Inc.--Reconsideration, supra.

In contrast, when we consider cases concerning withdrawal of a bid, we apply a different standard, allowing withdrawal whenever it reasonably appears that an error was made. Murphy Brothers, Inc.--Reconsideration, supra. In this regard, in view of the longstanding general rule that acceptance of a bid with knowledge of an error does not consummate a valid and binding contract, 36 Comp. Gen. 441, supra; Ruggiero v. United States, 420 F.2d 709 (Ct. Cl. 1970), we have held that where the Government undertakes to bind a bidder to its bid, after notice of a claim of error by the bidder, the Government "virtually undertakes the burden of proving that there was no error or that the bidder's claim was not made in good faith." 36 Comp. Gen. 441, supra. If that burden is not satisfied, we will find that the bidder cannot be held to the contract purportedly awarded. Murphy Brothers, Inc.--Reconsideration, supra.

Here, B&A submitted its worksheets which seemed to indicate that Sierra was to supply the circuit breaker plus spare parts, engineering and stud connectors at \$97,500. It also submitted a sworn statement from Sierra's Secretary indicating that its initial oral quote to B&A of \$97,500 omitted the additional items and that the corrected quotation including all items was \$128,350. Sierra's worksheets were also submitted, but they revealed little. While we believe the Bureau's conclusion that Sierra's intended quote and therefore B&A's intended bid were not clearly and convincingly shown from the evidence was reasonable, B&A would have been allowed by this Office to withdraw its bid since the evidence supplied by B&A and Sierra could support B&A's claim of mistake and the agency has not met its burden of proving that a mistake was not made. In this regard, although the agency seems to have completely

discounted the evidence submitted as indicating that a mistake was made, the bidder's assertion of a mistake, supported by its worksheets and the sworn statement from its supplier, does constitute evidence of a mistake. In this connection, we point out that mistakes by a bidder's supplier or subcontractor are cognizable under mistake in bid procedures. MKB Manufacturing Corporation, 59 Comp. Gen. 195 (1980), 80-1 CPD 34.

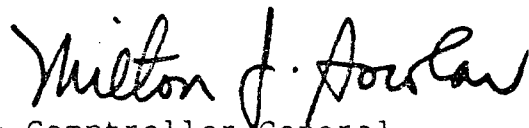
While the Bureau had authority to determine that the data submitted did not constitute clear and convincing evidence of a mistake so as to permit that agency to allow B&A to withdraw its bid, since some probative evidence of mistake was submitted, the Bureau should not have concluded that this was not a doubtful case; rather it should have referred the question of whether a mistake was made to this Office. Murphy Brothers, Inc.-Reconsideration, 58 Comp. Gen. 583 (1979), 79-1 CPD 400. Had the matter been brought before our Office prior to award we would have made an independent determination under the less stringent criteria applied by the Court of Claims and, as we did here, conclude that sufficient evidence of a mistake did exist to permit withdrawal.

Since we conclude that B&A should have been permitted to withdraw its bid, Interior's award to B&A with actual knowledge of the mistake did not consummate a valid and binding contract. Murphy Brothers, B-189756, March 8, 1978, 78-1 CPD 182. Because it appears that substantial contract work has begun and thus rescission is not feasible, B&A should receive payment on a quantum valebant or quantum meruit basis, that is the reasonable value of the services and materials actually furnished by B&A to the Government, not to exceed the amount B&A most recently claims as its price. See Ubique, Ltd., B-180610, August 12, 1974, 74-2 CPD 90.

In so holding, we reject a subsequent request made by Interior on December 17, 1980, that we dismiss B&A's claim in light of the Contract Disputes Act of 1978, 41 U.S.C. 601-613 (Supp. III 1979) and a recent amendment to FPR § 1-2.406-4 which provides for contracting officer resolution of mistake-in-bid claims alleged

or disclosed after contract award and for appeal of contracting officer decisions on such claims to the applicable Board of Contract Appeals. See amendment 204, February 19, 1980, 45 Fed. Reg. 10789. Although we agree with Interior that under the Contract Disputes Act boards of contract appeals now have authority to consider such mistake-in-bid claims, we do not agree that it is inappropriate for us to consider B&A's claim which resulted from B&A's allegation of mistake before award. The recent FPR amendment relied on by Interior relates only to mistakes in bid "alleged or disclosed after [contract] award." Moreover, publication of the amendment in the Federal Register was accompanied by a statement explicitly recognizing that "The act [does] not * * * affect the resolution of mistakes in bid disclosed before award," 45 Fed. Reg. 10789, and the procedures to be followed by contracting officers where, as here, a mistake is alleged prior to award, was not changed. See FPR § 1-2.406-3(e). Thus, we believe the requirement for referring "doubtful" cases to our Office contained in FPR § 1-2.406-3(e) and upon which our holding rests still governs this case.

Finally, B&A's request to recover the costs for pursuing this matter is denied. The general rule is that the employment and payment for an attorney is a matter between the claimant and the attorney and, in the absence of a statutory provision authorizing the recovery of attorney's fees, there is no authority for the payment of such fees by the Government. Harco, Inc.--Claim for Legal Fees and Bid Preparation Costs, B-189045, January 26, 1979, 79-1 CPD 55.



Acting Comptroller General
of the United States



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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-197437

February 18, 1981

The Honorable James G. Watt
The Secretary of the Interior

Dear Mr. Secretary:

Enclosed is a copy of our decision of today concerning a claim submitted by B&A Electric Company under a contract awarded by the Bureau of Reclamation. In our decision, we hold that the Bureau improperly awarded a contract to B&A notwithstanding B&A's claim of mistake without first referring the matter to our Office as a doubtful case under Federal Procurement Regulations § 1-2.406-3 (e) (1964 ed., amend. 204). We also found that it reasonably appears that B&A made an error and that B&A should receive payment for the reasonable value of the services and materials furnished by B&A to the Government.

Sincerely yours,

Milton J. Aarlan

Acting Comptroller General
of the United States

Enclosure

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